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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/042,669	01/09/2002	David Small	78781P031	6158
8791	7590	05/28/2004	EXAMINER	
BLAKELY SOKOLOFF TAYLOR & ZAFMAN 12400 WILSHIRE BOULEVARD, SEVENTH FLOOR LOS ANGELES, CA 90025			ACKUN, JACOB K	
			ART UNIT	PAPER NUMBER
			3712	

DATE MAILED: 05/28/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/042,669

**Applicant(s)**

SMALL ET AL.

**Examiner**

Jacob K. Ackun Jr.

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 March 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-109 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) as indicated in office action is/are allowed.
- 6) ☒ Claim(s) as indicated in office action is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

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1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
2. Claims 8, 9, 11, 43, 44, 61, 65, 66 67 and 68 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims such as claims 8 and 9 are rejected for the reason noted in the first office action. In response to the applicants argument regarding this rejection, the examiner never indicated that there was anything inherently wrong with functional language in a product claim. The problem with claims such as claims 8 and 9 is that the only limitation in each appears to be entirely functional. Accordingly the specific structure intended to be added by each dependent claim can not be determined. Moreover applicants additional argument that the “structure” in question is whatever structure would enable the heater to meet the function is unconvincing and appears circular. All structural elements in a claim to a product should be clear and definite from the claim. For example, does the ability to heat to the particular temperatures recited in the claims result from the heater being constructed from a particular material or from some other structural element? Claims such as claim 44 are indefinite for similar reasons. It is not clear how the recitation that chocolate has a certain melting temperature further limits the claim. Claims 65 and 66 are indefinite because it is not clear how the terms “commercial” or “toy” are intended to further limit that which is claimed. For example almost any object can be played with by a child or an adult having access to that object. Does that make it a toy at that point in time or not?

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3. Claims 1, 6, 8, 9, 17, 22, 40, 43, 44, 47, 48, 49, 50, 51, 52, 53, 54, and 55 rejected under 35 U.S.C. 102(b or e) as being anticipated by D'Agostino, Herskovitz or Belanger. The references are applied as set forth in the last office action.

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 7, 12, 13, 14, 15, 23, 24, 25, 26, 27, 28, 29, 30, 33, 35, 36, 37, 38, 56, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 91, 92, 93, 94, 101, 102, 103, 107, 108 and 109 are rejected under 35 U.S.C. 103(a) as being unpatentable over D'Agostino, Herskovitz or Belanger et al.

Each of the noted references shows most of the elements of the claims but may not specifically teach chocolate or chocolate in specific forms or other specific steps or structure. For example D'Agostino refers to confectionary generally. On the other hand it would have been obvious to provide the devices disclosed in the references with the missing structural elements or to use them as claimed, for the purpose of facilitating easier dispensing and use of chocolate.

6. Claims 4, 5, 11, 18, 19, 20, 21, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 95, 96, 97, 98, 99, 100, 104, 105 and 106 avoid the prior art of record, and would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, second paragraph, set forth in this Office action, unless no such rejections of any of these claims were made, in which case they are allowed.

7. Applicant's arguments filed 03/01/2004 have been fully considered but they are not persuasive. The rejected claims are not considered to structurally distinguish over the references

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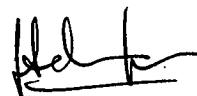
even though they may recite functions or intended uses different from those taught in the references. In each case the devices of each reference are considered to be inherently capable of the functions or intended uses recited in the claims.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacob K. Ackun Jr. whose telephone number is (703)308-3867.

The examiner can normally be reached on Monday through Friday 8.30AM-5.00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Derris Banks can be reached on (703)308-1745. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Jacob K. Ackun Jr.  
Primary Examiner  
Art Unit 3712

J.A.